At page 226 of the judgment of Dixon and Evatt JJ. the following passage occurs: —

"The problem will at times present itself as that of distinguishing between an immediate and a remoter purpose and of deciding whether the remoter is dominant or essential and the immediate subordinate or accidental. At other times it will appear as a question whether the existence of a main or paramount purpose is manifested notwithstanding that the declaration of the charitable trust takes the form of a direction to carry out a detailed plan."

Harman J. at page 958 of the *Whittaker* case said: —

"In my judgment this was a fund not subject to a condition. *It was devoted to charity from the outset and could have been used for that purpose from the outset if the money could have been raised.* If the gift be devoted to charity, then the fact that difficulties arise during the intervening period cannot be allowed to cause it to fail."

The portion italicized is apposite to the facts of the present case (see the letter of solicitors for the trustees dated 23rd July 1966 (Ex. VNC 13) at paragraph 9).

I find that, on a proper construction of Clause 4 of the Testator's Will, he has evinced a general charitable intention in favour of the advancement of education (both religious as well as in English and other general subjects) amongst members of the Gatchee community to which he probably belonged. His dominant intention was to benefit that community by giving them opportunities which perhaps he himself may have lacked in his younger days. After having made his fortune in Singapore he considered the town or district in India from which he originally came as a suitable starting-point at or near which to commence the fulfilment of his intentions by a trust he called the Valibhoy Charitable Trust in favour of a wider charitable purpose than the mere provision of new schools at a particular spot. He has made clear provision for the relief of poverty by Clause 4(iv) as well. In my considered judgment, the said Trust called the Valibhoy Charitable Trust was not motivated by a purely parochial or narrow and circumscribed intention.

In all the circumstances, notwithstanding Clause 6 which clearly shows that the Testator never foresaw nor could have foreseen the events which have now arisen, the three trusts with which I am now concerned have not failed but should be carried into effect cy-pres by a scheme which conforms to his directions as closely as possible. I direct that such a scheme should be prepared and submitted to me for approval in Chambers.

Order accordingly.

Solicitors: *Donaldson & Burkinshaw; Oehlers & Choa.*

MALAYSIAN REPORTS

SAFETY INSURANCE COMPANY SDN. BHD. v. CHOW SOON TAT

[F.C. (Gill C.J., Raja Azlan Shah and Wan Suleiman F.JJ.) November 16, 1974]

[Kuala Lumpur — Federal Court Civil Appeal No. 81 of 1973]

Practice and Procedure — Arbitration — Fire insurance — Provision in fire insurance policy for reference to arbitration — Time fixed in agreement — Lapse of time — Application to extend time — Undue hardship — Arbitration Act, 1952, s. 28.

Insurance — Arbitration — Lapse of time — Extension.

In this case a fire insurance policy had been taken out by the respondent to insure his construction materials at a work site. A fire occurred at the work site on December 30, 1968 causing the total destruction of the respondent's store. The respondent submitted a claim or $154,702.55 on January 5, 1969, but the appellant did not write to the respondent rejecting his claim or making a counter-offer. The respondent was therefore unable to refer the matter to arbitration within the period of one year from the happening of the loss or damage. It was only on June 20, 1972 that the appellant informed the solicitors for the respondent that it was repudiating liability under condition 19 of the policy which relieved it from any liability after the expiration of twelve months from the date of the fire. The appellant maintained that since the respondent had failed to resort to arbitration under condition 18 of the policy within twelve months of the date of the fire, the respondent's right to arbitration was time barred. The respondent thereupon applied for enlargement of time. Mohamed Azmi J. allowed the application and the appellant appealed to the Federal Court.

Held, dismissing the appeal: (1) in this case the claim which was made was not rejected, so that no dispute or difference arose as to the amount of any loss or damages, and therefore the respondent could not have referred the matter to arbitration under condition 18 of the policy;

(2) if the intention of the appellant all along was to deny liability altogether on the respondent's claim it should have written to the respondent to make that perfectly clear to him. In the circumstances the respondent had made out a case of undue hardship, that is, greater hardship than the circumstances warrant or hardship greater than that which in justice, a claimant should be called upon to bear;

(3) the learned trial judge in this case exercised his judicial discretion correctly in granting the extension of time on the ground of undue hardship. The learned trial judge had taken all the relevant factors into account in the exercise of his discretion and there was nothing wrong in the way in which he dealt with the application.

Cases referred to:-

(1) *Liberian Shipping Corporation* v. *A. King and Sons Ltd.* [1967] 1 All E.R. 934.

(2) *Atlantic Shipping and Trading Co. Ltd.* v. *Louis Dreyfus & Co.* [1922] 2 A.C. 250 at p. 255.

(3) *Wong Lang Hung* v. *National Employees Mutual General Insurance Association Ltd.* [1972] 2 M.L.J. 191.

(4) *F.E. Hookway & Co. Ltd.* v. *H.W. Hooper & Co.* [1950] 2 All E.R. 842.

(5) *Lynchburg Cotton Mills* v. *Travellers* (1905) 140 Fed. Rep. 718.

(6) *Scott* v. *Avery* (1956) 25 L.J. Ex. 308.

(7) *Heyman* v. *Darwins Ltd.* [1942] A.C. 356, 377.

(8) *Viney* v. *Bignold* (1888) 20 Q.B.D. 172.

(9) *Bruce* v. *Strong* [1951] 2 K.B. 447.

(10) *Cameron* v. *Cuddy* [1914] A.C. 651, 656.

The following authorities were also cited in argument: *Curtis* v. *Home Insurance* (1865) 1 Biss. 485, cited in *MacGillivray* on Insurance Law, 4th Ed. S. 1794; *Thompson* v. *Phoenix* (1893) 51 Fed. Rep. 715, cited in *MacGillivray* on Insurance Law, 4th Ed. S. 1794; *Hughes* v. *Metropolitan Railway Co.* [1874-80] All E.R. Rep. 187.

FEDERAL COURT.

V. P. Nathan for the appellant.

Ong Chin Beng for the respondent.

In the court below (Originating Motion No. 25 of 1973) *Ong Chin Beng* appeared for the applicant and *V. P. Nathan* appeared for the respondent (the appellant before the Federal Court). Mohamed Azmi J. on June 16, 1973 delivered the following judgment:

Mohamed Azmi J.: This is an application by Originating Motion dated April 12, 1973 for time to be enlarged for an arbitrator to be appointed under condition 18 of Fire Insurance Policy No. 3386 issued by the respondent company, pursuant to section 28 of the Arbitration Act, 1952 (Revised — 1972). The application is supported by the affidavits of the applicant and his former solicitor, Mr. Teoh Hooi Leong, of Messrs. Teoh & Foo, sworn on April 11, 1973. By the affidavits of Mr. Tai Vai Meng, a director of respondent company, dated May 23 and June 14, 1973, and the affidavit of Mr. Chong Poh Siew, the respondent's public relation officer, sworn on May 23 the same year, the respondent contends that the application is misconceived and should be dismissed.

The brief facts of this case are as follows. Some time in 1967 the applicant was awarded a Government contract worth about $4.5 million in connection with the Muda Irrigation Scheme Kedah. In compliance with the terms of the said contract, the applicant took out an insurance policy from the respondent company at a premium of $5,000 to insure against fire of the construction materials at the Lana Bulu worksite for the period from June 19, 1967 to June 19, 1969. (See Policy No. 3386 marked "CST 1"). The policy contains an arbitration clause and also a condition which provides a time limit for the company's liability for a period of twelve months from the happening of the loss or damage unless the claim is the subject of pending action or arbitration. On December 30, 1968 at about 7.30 p.m., *i.e.* during the currency of the policy, a fire occurred at the applicant's worksite which gutted the store containing the insured construction materials. The occurrence of the fire was immediately notified to the respondent company by telegram and followed by an A.R. registered letter dated January 1, 1969 requesting the respondent to send a surveyor immediately. (See annexure "CST 4"). The respondent acknowledged receipt of the applicant's cable vide letter dated January 2, 1969 (annexure "CST 5"). By a separate letter, the respondent also notified the applicant that the company was cancelling the policy with effect from January 9, 1969. (See annexure "CST 6" which was wrongly dated February 2, 1969). On January 5 the same year, in compliance with the respondent's request, the applicant submitted the claim form duly completed together with the complete list quantifying his loss at $154,702.55. (See annexures "CST 7", "CST 8", "CST 9" and "CST 10"). The applicant's claim of $154,702.55 has not been settled by the respondent although throughout 1969, except between the months of February and May, the parties were in touch about the claim. In October 1969, the applicant obtained the services of Messrs. Teoh & Foo, advocates and solicitors, to pursue his claim. In January 1970, the applicant alleged that he rejected the respondent's offer of $40,000 in settlement of the claim under the policy. This is denied by the respondent. After a lapse of two years, the applicant then obtained the services of new solicitors, Messrs. Ong & Company, who wrote to the respondent about the applicant's claim on June 15, 1972. By letter dated June 20, 1972, the respondent informed Messrs. Ong & Company that the company was repudiating liability under condition 19 of the policy which relieves them from any liability after the expiration of twelve months from the date of the fire. (See annexure "CST 21"). The respondent argues that since the applicant has failed to resort to arbitration under condition 18 of the policy by December 30, 1969, the applicant's right to arbitration is time-barred. Hence, the present application for enlargement of time.

Under section 28 of the Arbitration Act, 1952 (Revised — 1972), it is provided that:

> "Where the terms of an agreement to refer future disputes to arbitration provide that any claims to which the agreement applies shall be barred unless notice to appoint an arbitrator is given, or an arbitrator is appointed, or some other step to commence arbitration proceedings is taken, within a time fixed by the agreement and a dispute arises to which the agreement applies, the High Court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may, on such terms, if any, as the justice of the case may require, but without prejudice to any written law limiting the time for the commencement of arbitration proceedings, extend the time for such period as it thinks proper."

In construing section 28, it is relevant to refer to the case of *Liberian Shipping Corporation* v. *A. King & Sons, Ltd.*[1] in which section 27 of the English Arbitration Act, 1950, which is in *pari materia* with our section 28, was considered by the Court of Appeal in England. In that case, it was held that an extension of time for arbitration may be granted under section 27 even though the claimant himself is at fault. On the question of "undue hardship", Denning L.J. said at page 938:

> "It does appear that in the past the courts have been inclined to emphasise the word 'undue', and to say that if a man does not read the contract and is a day or two late, it is a 'hardship'; but it is not an 'undue hardship', because it is his own fault. I cannot accept this narrow interpretation of the statute. These time-limit clauses used to operate most unjustly. Claimants used to find their claims barred when, by some oversight, they were only a day or two late. In order to avoid that injustice, the legislature intervened so as to enable the courts to extend the time whenever 'in the circumstances of the case undue hardship would otherwise be caused'. 'Undue' there simply means excessive. It means greater hardship than the circumstances warrant. Even though a claimant has been at fault himself, it is an undue hardship on him if the consequences are out of proportion to his fault."

At page 940 Salmon L.J. in his judgment said:

> "That section seems to me to state quite plainly that if, having considered all the circumstances of the case, the court comes to the conclusion that the hardship imposed by the form of the arbitration clause on the claimant is greater than that which, in justice, he should be called on to bear, the time within which to appoint an arbitrator may be extended by the court. I do not believe that the courts are entitled to read words into this section which are not there and which would have the effect of cutting down the power given to the courts by the plain language of the section itself."

In construing whether the court should exercise its power under section 27, Salmon L.J. at page 943 gave the following guidelines:

"I am not prepared to hold that the court's power under the section should be very rarely exercised. Still less that they should be exercised freely. The question whether those powers should or should not be exercised must turn exclusively on the particular facts of each case in which the question arises.

In considering this question the court must take all the relevant circumstances of the case into account: the degree of blameworthiness of the claimants in failing to appoint an arbitrator within the time; the amount at stake, the length of the delay; whether the claimants have been misled, whether through some circumstances beyond their control it was impossible for them to appoint an arbitrator in time. In the last two circumstances which I have mentioned, which do not arise here, it is obvious that normally the power would be exercised; but those are not the only circumstances and they are not, to my mind, necessary circumstances for the exercise of the power to extend time. I do not intend to catalogue the circumstances to be taken into account, but one very important circumstance is whether there is any possibility of the other side having been prejudiced by the delay."

From the above judgment and from the plain words of our section 28, the High Court has a wide discretion to extend the time fixed for arbitration for such period as it thinks proper provided it is of the opinion that in the circumstances of the case undue hardship would otherwise be caused. As stated by Lord Justice Salmon, the question whether the power should or should not be exercised must turn exclusively on the facts of each case in which the question arises. The power can be exercised even in cases where the applicant is at fault if the consequences are out of proportion to his fault and greater hardship would be caused than the circumstances warrant. The relevant part of Condition 18 is in the following terms: —

"If any difference arises as to the amount of any loss or damages such difference shall independently of all other questions be referred to the decision of an arbitrator, to be appointed in writing by the parties in difference, or, if they cannot agree upon a single arbitrator, to the decision of two disinterested persons as arbitrators,... *And it is hereby expressly stipulated and declared that it shall be a condition precedent to any right of action or suit upon this policy that the award by such arbitrator, arbitrators or umpire of the amount of the loss or damage if disputed shall be first obtained."* (The italics are mine).

Condition 19, however, provides:

"In no case whatever shall the company be liable for any loss or damage after the expiration of twelve months from the happening of the loss or damage after *unless the claim is the subject of pending action or arbitration."* (The italics are mine).

In this case, although Condition 18 does not specify any time limit, I agree with the submission of learned counsel for the respondent that the arbitration clause in the policy should not be read in isolation. Condition 19 clearly limits the right to arbitration under Condition 18 to a twelve-month period from the date of the fire.

The respondent's objection to the present application is based on three main grounds. On the first ground, it is submitted that where the insured did not during the currency of the claim have available to him the remedy of arbitration, he cannot now seek to extend the time to commence arbitration under section 28 since the dispute, if any, only arose more than twelve months after the date of the fire. With respect, I think this argument is self-defeating. If the dispute only arose more than twelve months after the date of the fire, how can it be argued that the insured — the applicant in the present case — had failed to avail himself of the remedy of arbitration when that remedy was not available during the currency of the claim? It is also argued that the applicant should have filed an action to prevent time running out under Condition 19. Again, I find this argument is untenable because how can that be done when it is stipulated under Condition 18 that an arbitration award is a condition precedent to any right of action or suit upon the policy? The decisions in *Atlantic Shipping and Trading Co. Ltd.* v. *Louis Dreyfus & Co.*[2] and *Wong Lang Hung* v. *National Employees' Mutual General Insurance Association Ltd.*[3] have been referred to on behalf of the respondent as authority for the proposition that a condition such as that in Condition 19 is a valid condition which will operate to bar the claim if the time limit has not been observed. Both cases did not, however, deal with the provision of section 28 of the Arbitration Act. In fact, *Wong Lang Hung's* case was decided before section 28 came into being. It is significant that in the present case, as also in the case of *Wong Lang Hung*, there is no time limit imposed by Condition 18 (the arbitration clause) for commencement of arbitration, but it is imposed indirectly by Condition 19 which relieves the insurer from any liability after the lapse of twelve months from the date of the fire. Since Conditions 18 and 19 are inter-related, they have to be construed together for the purpose of determining whether the power of the court under section 28 should be applied. To my mind, their effect is that, on the one hand Condition 18 makes arbitration mandatory if there is a difference or dispute as to the amount of loss or damage, and further makes it a condition precedent to any right of action or suit on the policy, Condition 19 on the other hand relieves the respondent company from liability for any loss or damage after the expiration of twelve months from the occurrence of the fire unless the claim is the subject of pending action or arbitration. It is my considered opinion that the time limit imposed by Condition 19 operates unjustly on the arbitration agreement as contained in Condition 18. I am not saying that Condition 19 is invalid, but it enables an insurer to deprive an insured unfairly of its rightful claim under the policy by playing for time. By not disputing the claim and by giving the impression that the insured's claim is being entertained or investigated, the insured can be placed in a state of predicament. He cannot resort to arbitration because the insurer refrains from disputing or rejecting the amount of loss or damage and as such prevents a "difference" from arising as envisaged by Condition 18. To resort to arbitration would therefore be premature. Yet, if he failed to go to arbitration within twelve months from the date of the fire, by a stroke of the pen the insurer can invoke Condition 19 and deprives the insured of any right under the policy. I have no hesitation in saying that as far as the arbitration agreement is concerned, Condition 19 is a vehicle of oppression and can be used, as in the present case, to cause undue hardship to an insured. The qualification "unless the claim is the subject of pending action or arbitration" in Condition 19 is merely the sugar that coats the bitter pill. In this case, I find the respondent has created a situation by which (a) Condition 18 could not be invoked or it would be premature for the applicant to

resort to it and as such there could not be any "pending arbitration", and (b) there could not be "pending action" simply because there was no arbitration award — such award being a condition precedent to any right of action. A vicious circle has thus been created and Condition 19 has been employed to defeat the arbitration clause unfairly. I therefore hold that under special circumstances as in the present case, particularly where the agreement provides for arbitration clause and the agreement itself contains terms which have been used to cause undue hardship to one party, the court will not hesitate to order for enlargement of time under section 28 of the Arbitration Act so long as the delay and the period of extension of time does not go beyond the time prescribed by any statute of limitation as to the filing of action or commencement of arbitration proceedings.

On the second ground, the respondent's objection is based on the issue of whether the applicant has proved "undue hardship" within the terms of section 28 of the Arbitration Act and in particular on the question of responsibility for the delay in resorting to arbitration. It is argued on behalf of the respondent that the applicant either forgot or was ignorant about Condition 19 limiting the time and as such it is difficult for him to show undue hardship on the authority of *F. E. Hookway & Co. Ltd.* v. *H. W. Hooper & Co.*[4] In that case it was held that in considering what is undue hardship the negligence of the seller or buyer in failing to take any steps to claim the arbitration as provided for by the agreement is a relevant circumstance, and by reason of the buyer's neglect it was impossible for him to show undue hardship and consequently the court's discretion should not be exercised in his favour. In the present case, however, I find there is no negligence on the applicant's part. Although in paragraph 20 of applicant's affidavit he states that he was frustrated and depressed by the respondent's repudiation of liability on a technical point of insurance law which he was not made aware of, he also explaints the reasons for the delay, namely, that he was led to believe that his claim was subsisting and that it might take some time for the respondent to settle any claim under its policy. In my view, paragraph 20 cannot be construed as an admission of negligence but as a submission that the delay in going to arbitration was not the fault of the applicant. In any event, the blame-worthiness of the applicant is only one of the factors to be taken into account when considering whether the discretion given under section 28 should be exercised. Other circumstances depending on the facts of each particular case must also be considered as was held in *Liberian Shipping Corporation* v. *A. King & Sons, Ltd.* (*ante*). In the case before me, the evidence shows that the applicant has been misled by the respondent's dilly-dallying tactic; that the delay is beyond the applicant's control and that by virtue of the respondent's conduct a situation has been created whereby it was impossible for him to appoint an arbitrator within the prescribed time. Further, the applicant's claim is for the sum of $154,702.55. By any standard, the amount at stake is very substantial although the claim is less than a third of the sum insured. Although the delay is about three years and eleven months from the date of the final discharge (December 30, 1969, having regard to all the other circumstances particularly the fact that the respondent is more to blame than the applicant for allowing the period of arbitration to lapse, in my opinion, this is a proper case where the court should exercise its discretion under section 28 in favour of the applicant.

It is contended by the respondent that the applicant has not complied with Condition 11 of the policy. Special reference was made to the letter of February 6, 1969 written by the respondent's loss adjusters (annexure "TVM 3") to show that the delay in the present case was caused by the applicant's failure to furnish the respondent with proof of loss of damage. If the applicant was really in breach of Condition 11, why did the respondent continue negotiating with the applicant and his former solicitor after December 30, 1969? Why let the applicant believe that his claim was still subsisting and being considered? The respondent could have made the offer of $40,000 before December 31, 1969, but this it did not do. If the respondent was really strict about proof of loss of damage, on what basis did it make the offer of $40,000 in January 1970? To my mind, the respondent ought to have informed the applicant before December 31, 1969 that it was not going to admit or entertain the applicant's claim so as to enable the applicant to resort to arbitration within the prescribed time. Alternatively, the respondent could have informed the applicant the amount it was prepared to indemnify him to the extent he could prove his losses. That to my mind would have been in keeping with the spirit of the terms and conditions of the policy.

Under paragraph 16 of Mr. Tai Vai Meng's affidavit, it is stated that the applicant's original solicitor ought to have filed an action before it is time-barred. But it is relevant to note that in the final paragraph of the applicant's letter to the respondent dated February 6, 1969 (annexure "CST 14"), it is stated that:

"Kindly note unless you dispute our claim within seven days from the date of receipt of this letter we shall treat it as acceptable to you."

The respondent had never rejected the applicant's claim within the period of twelve months from the date of the fire, but merely asked for proof of the various items in the claim and it apparently allowed the applicant time to do so. Since the respondent gave the impression that it was merely processing or investigating the claim, it is reasonable for the applicant's former solicitor not to file any action. Further, even if an action had been filed, it would not have been proper as the applicant must first obtain an arbitration award.

The third and final ground for the respondent's opposition to the present application is that the applicant should have filed an action within three months of the rejection of the offer of $40,000 or within twelve months of rejection of the claim as per decision in *Lynchburg Cotton Mills* v. *Travellers*[5] under Condition 13 of the policy. This condition states:

"If the claim be in any respect fraudulent or if any false declaration be made or used in support thereof, or if any fraudulent means or devices are used by the insured or any one acting on his behalf to obtain any benefit under this

Policy, or, if the loss or damage be occasioned by the wilful act, or with the connivance of the insured; or *if the claim be made and rejected* and an action or suit be not commenced within three months after such rejection *or (in case of an arbitration taking place in pursuance of the 18th Condition of this Policy)* within three months after the arbitrator or arbitrators or umpire shall have made their award, all benefit under this Policy shall be forfeited." (The italics are mine).

The short answer to this argument is that there is no satisfactory evidence on record that the respondent had expressly rejected the applicant's claim of $154,702.55 — at least not until June 20, 1972 when it repudiated liability. In any event, Condition 13 is not that relevant in this application.

Looking back as it were to the whole circumstances of this case, it is reasonable to infer from the correspondence that the respondent knew or ought to have known that by August 1969 a difference would arise as to the amount of the loss suffered by the applicant due to the alleged inability of the applicant to prove the whole claim of $154,702.55. Yet, by its conduct, the respondent continued to give the impression that the applicant's claim was still under consideration. It was not until June 20, 1972 when it slammed in Condition 19 that the respondent for the first time was expressly disputing the entire claim and denying liability, by which time it was of course too late for the applicant to resort to arbitration under Condition 18. In paragraph 7 of Mr. Tai Vai Meng's affidavit, he states that no offer was made before December 30, 1969 as he had no satisfactory proof of the alleged loss of $154,702.55 claimed by the applicant. As submitted by counsel for the applicant between August and December 30, 1969, the respondent was in the position to and could have informed the applicant the amount it was prepared to indemnify him to the extent the applicant could prove his loss. The inference is clear. Whilst giving the impression that it was entertaining the applicant's claim, the respondent had all along set its eyes on Condition 19. If it had made an offer before December 31, 1969 and it was rejected, that would have enabled the applicant to resort to arbitration within the prescribed time. But once the deadline is passed (December 30, 1969), the applicant would be helpless and he would be completely under the mercy of the respondent. With the deadly Condition 19 in its hands, the respondent hoped the applicant would be forced to accept any offer it cares to make by way of settlement under the policy. The applicant would then be given a Hobson's choice. This is what the respondent precisely did on January 14, 1970 when it for the first time offered the applicant's former solicitor, Mr. Teoh Hooi Leng, $40,000 in settlement and later the same year made the same offer to the applicant personally. But on both occasions the offer was rejected by the applicant. Although the offer of settlement is denied by Mr. Tai Vai Meng (a Director of respondent company) and also by Mr. Chong Poh Siew (the respondent's Public Relation Officer) in their respective affidavits, I am satisfied that such offer was in fact made as alleged in paragraphs 17 and 18 of the applicant's affidavit and corroborated by Mr. Teoh Hooi Leng in his affidavit sworn on April 11, 1973. In any event, neither Mr. Tai Vai Meng nor Mr. Chong Poh Siew has denied in their affidavits regarding the meeting at the respondent's office between the applicant's former solicitor and one Mr. Tai, a representative of the respondent, for the purpose of discussing the applicant's claim on January 14, 1970.

It is therefore my finding that until the respondent denied liability under Condition 19 vide its letter dated June 20, 1972, the applicant was all along led to believe that his claim was still under consideration by the respondent company. The respondent could have disputed the amount of loss claimed by the applicant at any time before December 31, 1969 — the deadline allowed for resorting to arbitration. But instead the respondent's representative continued to discuss the applicant's claim with his former solicitor by phone, and the respondent even went to the extent of making the offer of $40,000 to settle the claim under the policy in 1970. On the balance of probabilities in the evidence, I am satisfied the applicant has been misled by the respondent.

The respondent's obstructive attitude can be traced as early as 1969. On January 2, 1969 the respondent wrote annexure "CST 5" to the applicant as follows:

"Dear Sirs,

Re: Fire on 30th December, 1968

We refer to your cable of 30th December, 1968 and reply thereto dated 31st December, 1968 regarding the fire accident under Policy No. 3386.

In this connection kindly submit us a list of the materials that you claim to be damaged by the fire and a copy of the Police Report in respect of the said accident.

On receipt of the above we shall cause an investigation into the matter.

Yours faithfully,
SAFETY INSURANCE CO., LTD.,
Sd.
Manager."

By letter dated January 17, 1969, the Malayan Adjustment Company Sdn. Bhd. — the respondent's loss adjusters — drew the applicant's attention to Conditions 11 and 12 of the policy and requested him to submit his claim together with proof of losses without further delay. The applicant replied that he had already complied with Conditions 11 and 12 by his letters dated 1st and 5th January addressed to the respondent company (*i.e.* annexures "CST 4" and "CST 7"). A copy of the reply was extended to the respondent company (see annexure "CST 12"). Yet, on January 31, 1969 the respondent had the nerve to write to the applicant stating that it had not received a reply to its letter dated January 2, 1969 which has been quoted in full above. Thinking that there was lack of communication in the respondent's office, the applicant wrote to the respondent on February 6 with a copy to its loss adjusters, expressing surprise that it had not received particulars of the fire loss. In the same letter, he also notified the respondent that unless it disputed his claim of $154,702.55 within seven days of receipt, he would assume that his claim on the policy is acceptable to the respondent. (See annexure "CST 14"). Since there was no reply to this particular notice, in my view, the applicant is entitled to assume that the respondent did not intend to reject the claim but was merely requesting for further particulars.

Further, it is relevant to consider the letter dated January 31, 1969 (annexure "CST 13") written by the respondent to the applicant which reads:

"Dear Sirs,

Re: Fire on 30.12.1968
Policy No. 3386

We send herewith photostat copy of our letter dated 2nd January, 1969 to which we regret not to have any reply so far.

Unless we receive from you the list and the report within seven days from the date of receipt of this letter we shall take it that you are not interested in this claim and shall close our file on it.

Yours faithfully,
SAFETY INSURANCE CO., LTD.,
Sd.
Manager."

From the first paragraph of the above letter, it is the respondent's allegation that it had not received annexures "CST 7", "CST 8" and "CST 9", *i.e.* the applicant's letter forwarding a claim form and a list of materials damaged by the first together with the estimated loss which was obviously done in compliance with Condition 11 of the policy. Since the respondent had acknowledged the A.R. Registered card marked "CST 10", it is reasonable to infer that it must have received the applicant's claim form and the list of damaged construction materials. In view of this finding, I can only conclude that the letter dated January 31 written by the respondent is an indication of its obstructive and dilly-dallying tactic towards the applicant's claim. It was only at the applicant's initiative that the respondent wrote to applicant on June 27, requesting for relevant invoices and bills, (annexure "CST 17"), thus giving the impression that it was still entertaining and investigating his claim under the policy. The applicant complied with the request as far as he could vide his letter dated August 6 (annexure "CST 18"). On August 28, he again wrote to the respondent requesting it to settle his claim without further delay (annexure "CST 20"), but there was no response. In October 1969 the applicant obtained the services of Messrs. Teoh & Foo, advocates and solicitors, who took up the applicant's claim with the respondent.

On the facts, this is therefore not a case where the claimant has through neglect failed to avail himself with the remedy of arbitration. The failure in resorting to arbitration within twelve months from the date of the fire was beyond the applicant's control. This is a case where the respondent had by its own doing created a situation whereby it became impossible for the applicant to resort to arbitration under Condition 18 within the time prescribed by Condition 19. In my view, it is this type of mischief, misfortune or hardship that section 28 sought to correct. As stated earlier on, once the twelve months had lapsed, *i.e.* after December 30, 1969, the respondent knew all along that the applicant would be forced to accept any offer it wishes to make by way of settlement. After the applicant had rejected its offer of $40,000 some time in January 1970 and since he persisted in his claim by engaging Messrs. Ong & Company, the respondent invoked Condition 19 on June 20, 1972 by which it hoped the applicant's claim would be laid to rest for good. But unfortunately for the respondent, the Arbitration Act, 1952 was amended by the introduction of section 28 which came into force on November 1, 1972, *i.e.* about four months after the respondent had denied liability, and by virtue of section 33 of the Act the new remedy under section 28 has retrospective effect. As such, the respondent's complaint that there was undue delay in filing the present application cannot be sustained. The delay is unavoidable. Having regard to the facts that the respondent is more to blame for the applicant's failure to resort to arbitration within the prescribed time; that the amount at stake is substantial; that the applicant has been misled by the respondent; that the failure to appoint an arbitrator is beyond the applicant's control, the fact that the applicant took about ten months to file the present application from the date of denial of liability cannot by itself be a ground for refusing extension of time. The remedy which he now seeks only became available in November 1972, and, under the circumstances, there is no unreasonable delay in filing the present Originating Motion on April 12, 1973.

It is my considered opinion that undue hardship has been established in this case. Further, the financial hardship as alleged by the applicant in paragraphs 22 and 23 of his affidavit has not been denied in the affidavit of either Mr. Tai Vai Meng or Mr. Chong Poh Siew. To my mind, even if the applicant can be proved to be at fault for not resorting to arbitration within the prescribed time, the consequences of dismissing this application would be out of proportion to his fault. It took the respondent more than three years after the occurrence of the fire to deny liability under Condition 19. Further, there is nothing substantial in the affidavits filed on behalf of the respondent to satisfy me that it would be prejudiced in any way if the application is allowed. The fact that the respondent company might have to re-adjust its fiscal policies, should the arbitration result in favour of the applicant, is nothing compared to the undue hardship on the part of the applicant. The only main effect of granting this application is to suspend the operation of Condition 19 of the policy which having regard to all the circumstances in this case would be fair and reasonable.

Having regard to the particular facts of this case, I am of the opinion that undue hardship within the terms of section 28 of the Arbitration Act would be caused to the applicant if the extension of time is not granted. I would therefore allow the application and order that an arbitrator be appointed under Condition 18 of the policy within two months, and by consent I also order that the costs of this application be borne by the applicant.

From the above judgment the respondent insurance company appealed to the Federal Court. In the Federal Court, Gill C.J. (Malaya) delivered the leading judgment with which Raja Azlan Shah and Wan Suleiman F.JJ. concurred:

Gill C.J. (Malaya): This is an appeal from an order dated June 16, 1973 made by Mohamed Azmi J. on the application of the respondent to this appeal for the appointment within two months from the date of the order of an arbitrator under Condition 18 of fire insurance policy No. 3386 issued by the appellant company to the respondent.

The policy was taken out by the respondent to insure his construction materials at the Lana Bulu work site, as required under a contract worth $4,523,268.50

awarded to him by the Government of Kedah in connection with the Muda Irrigation Scheme. The construction materials were insured for a sum of $500,000 for a consideration of $5,000 for the period June 19, 1967 to June 19, 1969.

Condition 11 of the policy required the insured forthwith to give notice of any loss or damage caused by fire, and within 15 days after such loss to deliver to the company a claim in writing containing particulars of all items of property damaged or destroyed and of the amount of loss or damage having regard to their value at the time of the loss or damage, not including profit of any kind. Under the same clause the insured was also required at all times at his own expense to produce, procure and give to the company all particulars of plans, specifications, books, vouchers and invoices etc. with respect to the claim and the origin and cause of the fire.

Condition 13 of the policy provided, *inter alia*, that

"if the claim be made and rejected and an action or suit be not commenced within 3 months after such rejection, or (in case of an arbitration taking place in pursuance of the 18th condition of the policy) within three months after the arbitrator or arbitrators or umpire shall have made their award, all benefit under this policy shall be forfeited."

The policy contained an arbitration clause in Condition 18, the relevant part of which reads as follows: —

"If any difference arises as to the amount of any loss or damage such difference shall independently of all other questions be referred to the decision of an arbitrator, to be appointed in writing by the parties in difference, or, if they cannot agree upon a single arbitrator, to the decision of two disinterested persons as arbitrators.... And it is hereby expressly stipulated and declared that it shall be a condition precedent to any right of action or suit upon this policy that the award by such arbitrator, arbitrators or umpire of the amount of the loss or damage if disputed shall be first obtained."

And Condition 19 of the policy provided that in no case whatever shall the Company be liable for any loss or damage after the expiration of twelve months from the happening of the loss or damage unless the claim is the subject of pending action or arbitration.

A fire occurred at the work site at about 7.30 p.m. on December 30, 1968 causing total destruction of the respondent's store together with its contents. The respondent caused a report to be made to the police immediately after the fire, and on the following day sent a telegram to the company. On January 1, 1969 he sent an A.R. registered letter requesting the appellants to send a surveyor immediately. The appellants acknowledged receipt of the respondent's telegram by their letter dated January 2, 1969 and asked him to submit a list of the materials which he claimed had been damaged by the fire. By a separate letter of the same date, which was wrongly dated 2nd February 1969, the appellants informed the respondent that they would cancel the policy with effect from January 1969 and would refund the amount due on the policy on account of its cancellation on surrender of the policy. On January 5, 1969 in compliance with the appellants' request the respondent submitted a claim form duly completed quantifying his loss at $154,702.55.

By a letter dated January 17, 1969 the Malayan Adjusting Company Sendirian Berhad, the appellants' loss adjustors, drew the respondent's attention to Conditions 11 and 12 of the policy and requested him to submit his claim together with proof of loss without further delay. The respondent replied by his letter dated January 28, 1969, with a copy to the appellants, that he had already complied with Conditions 11 and 12 by his letters dated January 1 and January 5 addressed to the appellants. On January 31, 1969 the appellants wrote to the respondent to say that they had not received any reply to their letter of January 2, 1969 and adding "unless we receive from you the list and the report within 7 days from the date of receipt of this letter we shall take it that you are not interested in this claim and shall close our file on it." The respondent wrote to the appellants on February 6, 1969, with a copy to their loss adjustors, expressing surprise that they had not received his particulars of the loss by fire and adding that unless they disputed his claim of $154,702.55 within 7 days of the receipt of his letter he would treat his claims as being acceptable to them. There was no reply by the appellants to the letter.

There was no communication between the parties between the months of February and May 1969. On June 3, 1969 the respondent wrote to the loss adjustors submitting further details to them and requesting them to forward his claim to the appellants for an early settlement. On June 27, 1969 the appellants wrote to the respondent for relevant invoices and bills in respect of his losses. By an A.R. registered letter dated August 6, 1969, which was acknowledged by the appellants, the respondent submitted the relevant invoices and bills. On August 28, 1969 the respondent wrote to the appellants requesting them to settle his claim without further delay. Having received no reply to this letter and being frustrated and annoyed by the appellants' attempts to obstruct and delay the settlement of his claim, the respondent obtained the services of a firm of advocates and solicitors, Messrs. Teoh & Foo, in October 1969.

It is alleged that after the respondent's solicitors' meeting with the appellants' representative on or about June 14, 1970 the appellants offered a sum of $40,000 in settlement of the respondent's claim and that the respondent rejected it. It is further alleged that one Chong Poh Siew who represented to the respondent that he was a representative of the appellants and had authority to negotiate settlement of the respondent's claim, saw the respondent on two occasions in 1970 at the respondent's office at 36 Jalan Bangsar, Kuala Lumpur and again offered $40,000 in settlement and that the respondent rejected it. All this is denied by the appellants.

As nothing transpired for more than 2 years from the time of his solicitors' communication with the appellants, and he was unable to obtain any satisfactory results from his then solicitors, the respondent on June 15, 1972 obtained the services of new solicitors, Messrs. Ong & Co., who wrote to the appellants about the respondent's claim. By their letter dated June 20, 1972 the appellants informed Messrs. Ong & Co. that they were repudiating liability in respect of respondent's claim under Condition 19 of the policy which relieved them of any liability after the expiration of 12 months from the date of the fire.

On April 12, 1973 the respondent made an application by way of Originating Motion to the High Court at Kuala Lumpur for an order that the time be enlarged for an arbitrator to be appointed under the provisions of the fire insurance policy. This application was made under section 28 of the Arbitration Act 1952 which reads as follows: —

"Where the terms of an agreement to refer future disputes to arbitration provide that any claims to which the agreement applies shall be barred unless notice to appoint an arbitrator is given, or an arbitrator is appointed, or some other step to commence arbitration proceedings is taken, within a time fixed by the agreement and a dispute arises to which the agreement applies, the High Court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may, on such terms, if any, as the justice of the case may require, but without prejudice to any written law limiting the time for the commencement of arbitration proceedings, extend the time for such period as it thinks proper."

In construing section 28, the learned judge considered the case of *Liberian Shipping Corporation* v. *A. King & Sons Ltd.*[1] which laid down the principles that whether the power to extend time should or should not be exercised must turn exclusively on the particular facts of each case, that the High Court has a wide discretion to extend the time for arbitration for such period as it thinks proper provided it is of the opinion that in the circumstances of the case undue hardship would otherwise be caused and that the power can be exercised even in cases where the applicant is at fault if the consequences are out of proportion to his fault and greater hardship would be caused to him than the circumstances warrant.

The application was opposed by the appellants on three main grounds. The first ground was that the respondent could not seek to extend time to commence arbitration under section 28 since the dispute, if any, arose more than 12 months after the fire. It was argued in this connection that the applicant should have filed an action to prevent time from running out under Condition 19. The second ground was that the respondent should have filed an action within 3 months of his rejection of the offer of $40,000 made to him or within 3 months after the final rejection of his claim so as to escape the penalty under Condition 13 of the policy. The third ground was that the applicant had failed to prove undue hardship within the meaning of section 28 of the Arbitration Act.

Each of the grounds of objection to the application was rejected by the learned judge for reasons set out in his judgment which may be summarised as follows. As the dispute arose after the period of 12 months from the date of the fire, it was not possible for the respondent to avail himself of the remedy of arbitration under Condition 18 within that period, and he could not file an action so as to prevent time from running out under section 19 because it was a condition precedent to any right of action or suit upon the policy that the award of an arbitrator shall be first obtained. Although no time limit was imposed by Condition 18, it was indirectly imposed by Condition 19 which relieved the appellants from liability after the lapse of 12 months from the date of the fire. Until the appellants repudiated liability under Condition 19 by their letter of June 20, 1972 the respondent was all along led to believe that his claim was still under consideration. There being no evidence that the appellants had expressly rejected the respondent's claim of $154,702.55, apart from repudiation of liability, Condition 13 was not relevant to the application. In any event the blameworthiness of the respondent was only one of the factors to be taken into account when considering whether a discretion under section 28 of the Arbitration Act should be exercised. By any standard the amount at stake was substantial. Notwithstanding the delay in the making of the application, and taking all the circumstances into consideration this was a proper case where the court should exercise its discretion under section 28 in favour of the respondent.

The conclusions at which the learned judge arrived on all the evidence before him are set out in his judgment as follows: —

"Having regard to the facts that the respondent is more to blame for the applicant's failure to resort to arbitration within the prescribed time; that the amount at stake is substantial; that the applicant has been misled by the respondent, that the failure to appoint an arbitrator is beyond the applicant's control, the fact that the applicant took about ten months to file the present application from the date of denial of liability cannot by itself be a ground for refusing extension of time. The remedy which he now seeks only became available in November 1972, and, under the circumstances, there is no unreasonable delay in filing the present Originating Motion on April 12, 1973."

In the result, he held that in the special circumstances of this case the court would not hesitate to order enlargement of time so long as the delay and such extension of time did not go beyond the time prescribed by any statute of limitation as to the filing of an action. He therefore made the order appealed from.

The appeal to this court from that order is made on numerous grounds. In so far as they relate to findings of fact made by the learned judge, I can find no substance in them. It is abundantly clear from the evidence before the learned judge at the hearing of the application that, apart from repudiating liability under Condition 19 of the policy in June 1972, at no time did the appellants write to the respondent rejecting his claim or making a counter offer. Indeed their case all along has been that they never made an offer of $40,000 in settlement of the claim as alleged by the respondent. The findings of fact made by the learned judge are therefore nothing but logical inferences from the incontrovertible fact that the respondent's claim was never rejected. No authority is required for the proposition that until a claim is made and rejected there can be no dispute or any difference as to the amount claimed. Here a claim was made, but as it was not rejected so that no dispute or difference arose as to the amount of any loss or damages, the respondent could not have referred the matter to arbitration under Condition 18 of the policy.

One of the grounds of appeal is that the learned judge erred in finding that the appellant had created a situation whereby there could be no pending action. There is also a similar ground of appeal to the effect that the learned judge erred in holding that it was reasonable for the respondent's former solicitor not to file an action. The answer to each of these two grounds

lies in the terms of Condition 18. *Russell* on Arbitration, 18th edition, says at page 57: —

"The parties to a contract may properly agree that no action shall be brought upon it until an award has been made, or (what amounts to the same thing) may agree that the only obligation arising out of a particular term of the contract shall be to pay whatever sum an arbitrator may award."

The authority for the above statement of law is to be found in the old case of *Scott* v. *Avery*.[6] That was a case in which a mutual assurance company inserted in all its policies a condition that, when a loss occurred, the suffering member should give in his claim and prove his loss before a committee of members appointed to settle the amount; that if a difference thereon arose between the committee and the suffering member, the matter should be referred to arbitration, and that no action should be brought except on the award of the arbitrators. It was held that this condition was not illegal as ousting the jurisdiction of the courts.

While parties cannot by contract oust the jurisdiction of the courts they can agree that no right of action shall accrue in respect of any differences which may arise between them until such differences have been adjudicated upon by an arbitrator. Such a provision is often termed a "*Scott* v. *Avery* clause", from the case cited above. (See *Russell* on Arbitration, 18th edition, page 168). In *Heyman* v. *Darwins Ltd.*[7] Lord Wright said:

"The contract, either instead of, or along with, a clause submitting differences and disputes to arbitration, may provide that there is to be no right or action save on the award of an arbitrator. The parties in such a case made arbitration followed by an award a condition to any legal right of recovery on the contract. This is a condition of the contract to which the court must give effect, unless the condition has been 'waived', that is, unless the party seeking to set it up has somehow disentitled himself to do so."

It follows that where a dispute is governed by such a condition an action in respect of that dispute cannot succeed, and no purpose will be served by allowing it to continue.

In *Viney* v. *Bignold*[8] a policy of insurance provided that any dispute arising in the adjustment of a loss should be submitted to arbitration, that the award of the arbitrator should be conclusive evidence of the amount of the loss, and that the party insured should not be entitled to commence any action until the amount of the loss should have been referred and determined, and then only for the amount awarded. In an action by the assured with reference to a dispute within the arbitration clause the defendants alleged that the amount of the loss had not been referred or determined. It was held that the provisions in the policy were good and the defence was an answer to the actions. Wills J. said at page 174: —

"The principle on which cases such as the present ought to be decided is very clear, and it is this. The court must look and see what the covenant is. If there is a covenant to pay the amount of the loss, accompanied by a collateral provision that the amount shall be ascertained by arbitration, such arbitration is not a condition precedent to the maintenance of an action on the covenant, but if the parties have covenanted that the liability is only to arise after the amount has been adjusted by arbitration, then such adjustment is a condition precedent to the right to recover. The real question comes to this, what have the parties covenanted to do?"

Under Condition 13 of the policy in the present case the respondent was obliged to bring an action within three months after the rejection of his claim. As his claim was never rejected, he obviously took the view that he had no right to bring an action. Condition 18 was to the effect that there was no right of action save upon the award of an arbitrator. As I have already stated, the respondent could not refer the matter to arbitration because the appellants let the time pass by not disputing his claim. This was the other factor which, rightly or wrongly, deterred the respondent from bringing an action. The question therefore is whether in those circumstances it was open to the respondent to bring an action so as to prevent his claim from being time barred.

In *Bruce* v. *Strong*[9] an arbitration agreement in a contract of sale provided that obtaining an award shall be a condition precedent to legal proceedings, and a clause of the agreement provided that any demand for arbitration had to be made within two months after the arrival of the goods. A dispute arose as to the weight of the packets of the goods and the buyer did not make a demand for arbitration within that time but later brought proceedings in the court. It was held that the applicants were entitled to have the dispute settled by arbitration and that a stay of the proceedings brought by the fourth party ought to be granted. Denning L.J. said, at page 458: —

"The clause in this contract said that any demand for arbitration must be made within two months after the arrival of the goods. The buyer did not make a demand for arbitration within that time, but later brought proceedings in the courts. The seller now says the proceedings should be stayed even though the time for arbitration has already expired; and it is clear that if the dispute does go to arbitration he intends to insist on the contractual time limit as an answer to the arbitration. At first I was inclined to think that the seller could not do that, because he would be saying in one and the same breath that the claim ought to go to arbitration and also that he was unwilling to go to arbitration. But the answer is that the High Court has power in case of undue hardship, to extend the time for arbitration. That was the machinery provided by the Act for the very difficulty which has arisen. Any other view would mean that a buyer would only have to let the time pass by and could then bring proceedings in the courts whether there were undue hardship or not. That would be absurd, because section 27 would never have any application at all. The remedy to the buyer, if he has one, is by application under section 27 to extend the time for arbitration."

It would seem clear from what was decided in the above case that even where the parties to a contract have agreed that any dispute arising out of that contract shall be submitted to arbitration and that an award shall be a condition precedent to any legal proceedings in respect of that dispute, it is open to the claimant to bring an action and for the court to grant a stay under section 6 of the Arbitration Act 1952, unless in its discretion it deems it a more convenient mode of trial to have the matter tried directly in the action. In such an event it is not material that the time fixed for demanding arbitration has run out, for to hold otherwise would mean that one party to the agreement could defeat the rights of the other party to have a dispute settled by his procedure merely by waiting until the time has elapsed. Moreover, under section 28 of the Act the court has power to extend the time if it is of opinion that undue hardship would otherwise be caused.

In *Cameron* v. *Cuddy*[10] it was held that in an action upon a contract whereby the parties have provided for arbitration as a means of ascertaining the amount due under the contract, if arbitration proceedings have proved abortive it is the duty of the court to supply the defect by itself ascertaining the amount due. In stating the judgment of their Lordships of the Privy Council, Lord Shaw of Dunfermline, said at page 656: —

"When an arbitration for any reason becomes abortive, it is the duty of a court of law, in working out a contract of which such an arbitration is part of the practical machinery, to supply the defect which has occurred. It is the privilege of a court in such circumstances and it is its duty to come to the assistance of parties by the removal of the impasse and the extrication of their rights. This rule is in truth founded upon the soundest principle, it is practical in its character, and it furnishes by an appeal to a court of justice the means of working out and of preventing the defeat of bargains between parties. It is unnecessary to cite authority on the subject, but the judgment of Lord Watson in *Hamlyn & Co.* v. *Talkisher Distillery* [1894] A.C. 202 might be referred to."

If the intention of the appellants all along was to deny liability altogether on the respondent's claim, as would seem abundantly clear from the facts of the case, they should have written to the respondent to make that perfectly clear to him and indicated that he should bring an action within 3 months of their rejection of his claim. I am compelled to say that the appellants' attitude was mean and contemptible. I am not quite certain as to whether the *contra proferentum* rule applies in this case. If it does, then it must be applied against the appellants.

In a synopsis of his written submissions, counsel for the appellants argues that, in the event that Condition 18 is not void, the application for extension of time was nevertheless misconceived, because no difference as to the amount having arisen, the arbitrator was wanting in jurisdiction, and that the time for arbitration having lapsed, the arbitrators' jurisdiction cannot be revived by a difference as to an amount purported to have arisen outside the time stipulated for commencing arbitration proceedings. I do not think there is any substance in this argument, because section 28 of the Act gives the High Court power to extend the time, notwithstanding that the time for commencing arbitration proceedings has expired. The very basis of the respondent's application for extension of time was that the appellants chose not to reply to his claim within the stipulated period.

The other points taken in the synopsis are as follows. Even if the application is not misconceived and the court constrains to find undue "hardship", it is futile to grant the extension sought as it only confers on the arbitrator jurisdiction in respect of quantum. The appellants will however in response to any future claim on the policy dispute liability for breach thereof, pleading *inter alia*, Conditions 11 and 13; the respondent's remedy for which is by way of action and this is time barred under Condition 19. The appellants can only be liable on the award as to quantum if he is liable on the policy in the first place. And there is no provision for extension of time for filing an action. Therefore to grant the extension sought is only to escalate the respondent's costs.

In my judgment, these points are not strictly relevant to the determination of this appeal. It is clear that the court has no power to extend time for the filing of an action, and the learned trial judge did not attempt to do so. What he did was to make an order, as stated by him in his grounds of judgment, so as to suspend the operation of Condition 19 of the policy so that the respondent's rights are restored and he is put on equal footing with the appellants, which having regard to all the circumstances of the case he considered fair and reasonable. The granting of extension of time does not in any way invalidate Conditions 13 and 19. It merely neutralises the appellants' oppressive attitude. If the appellants intend to dispute liability under the policy altogether, it will be open to them to waive the arbitration clause in the event of the respondent bringing an action. As Conditions 18 and 19 are interconnected extension of time to commence arbitration proceedings would appear to be tantamount to extension of time for filing an action.

The main issue in this appeal is whether the court below exercised its judicial discretion correctly on the facts before it. It is contended for the appellants that in the circumstances of the present case there cannot be a finding of undue hardship within its definition in the case law. I do not agree. It is true that there was inordinate delay on the part of the respondent in making the application for extension of time, but that is not the only factor to be considered. The latest pronouncement on the difficult question of undue hardship, by a majority decision of the English Court of Appeal in *Liberian Shipping Corporation* v. *A. King & Sons Ltd.*,[1] is that undue hardship merely means greater hardship than the circumstances warrant or hardship greater than that which, in justice, the claimant should be called upon to bear. That the learned trial judge took all the relevant considerations into account in the exercise of his discretion to grant extension of time is abundantly clear from his grounds of judgment, and I can find nothing wrong in the way in which he dealt with the application and in the conclusions to which he arrived.

I would dismiss this appeal with costs. In view of the time which has elapsed since the making of the order for extension of time by reason of this appeal, I would make an order that the time for the appointment of an arbitrator or arbitrators under Condition 18 of the policy be and is hereby extended to December 29, 1974.

Raja Azlan Shah and **Wan Suleiman F.JJ.** concurred.

Solicitors: *Ong Chin Beng & Rakan-rakan.*